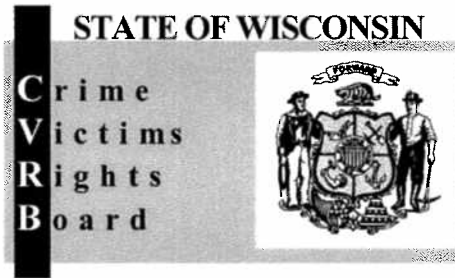

REPORT AND RECOMMENDATION OF THE WISCONSIN CRIME VICTIMS RIGHTS BOARD

Wisconsin Stat. § 950.09(3) authorizes the Crime Victims Rights Board ("Board") to "issue reports and recommendations concerning the securing and provision of crime victims' rights and services." The following report makes recommendations to district attorneys and court personnel regarding the best practices for complying with the obligations set forth in Wis. Stat. ch. 950.

Factual Background

The victim of the defendant charged with felony hit and run was seriously injured when the defendant shifted a pickup truck into reverse, backed over the victim's arm and back, and then drove forward over the victim's back and arm before leaving the scene. The victim and the defendant, both Wisconsin residents, were employed by different law enforcement agencies at the time of the incident, and had been dating for some time previous to the incident. The case was transferred to a special prosecutor shortly after the criminal complaint had been filed. The special prosecutor and the defendant's legal counsel engaged in lengthy settlement discussions, but did not reach an agreement by the time the trial was scheduled to begin in a month.

A month before trial was scheduled to begin, the victim informed the special prosecutor that the victim was moving to another state within the next few days, and made an appointment to meet with the special prosecutor. The prosecutor advised the victim of the need to return to Wisconsin for trial. The two made arrangements for further communication after the victim's move. The prosecutor told the victim that the defendant wanted more to settle the case than the prosecutor was willing to give, and that the prosecutor stood the prosecutor's ground. The prosecutor did not tell the victim that a possible disposition of the case could be dismissal of the charges against the defendant if the defendant satisfied certain conditions for a defined period of time.

The victim contacted the prosecutor six days later, after relocation. The next day the prosecutor notified the victim that it appeared that the defendant was finally going to accept the prosecutor's offer to hold the case open for a period of time while the defendant completed certain conditions that the prosecutor was not free to discuss, that the case would be dismissed if the defendant satisfied the conditions, and that the defendant would be convicted of felony hit and run if the conditions were not satisfied. Shortly after the prosecutor's initial notification of settlement, the circuit court

conducted an in-chambers status conference with the prosecutor and the defendant's counsel. The court was informed about the terms of the settlement agreement, including its confidentiality term, approved the terms of the settlement, and set the matter for another status conference a few months later. Although the agreement was in written form, it was not filed with the court.

The Board has been informed that it is the practice of the judges in the county where the case was filed to use in-chambers status conferences as the mechanism to inform themselves about the terms of deferred prosecution agreements and other agreements that could result in the dismissal of charges against a defendant, including the conditions that must be met by the defendant in order to achieve the dismissal of the charges against him or her. The Board has been informed that the judges typically allow only the prosecutor, the defendant's counsel, and the defendant to attend those conferences, and typically exclude the victim and members of the public. The Board is informed that the judges typically indicate during those conferences whether the court will accept the terms of the agreement. If the defendant satisfies the conditions of the agreement, the prosecutor submits a notice to the court withdrawing the charges against the defendant, whereupon the court enters an order dismissing the charges. The Board has been informed that victims have no opportunity to object to the potential disposition of cases when such procedures are used.

On the day that the status conference in question occurred, the prosecutor informed the victim that the case had resolved, and that the agreement contained a provision that the defendant could not have contact with the victim. The next day, the victim inquired whether the prosecutor could provide any more information about the resolution of the case, how long the "no contact" order would remain in effect, and whether the court ordered the "no contact" term. The prosecutor responded by advising the victim of the date of the next status conference, and telling the victim that no other information could be given. Several weeks later, the victim submitted a written request to the prosecutor to "obtain sentencing and/or dispositional information regarding the case" pursuant to the victim's rights. The prosecutor declined on that occasion and on several subsequent occasions to provide any additional information to the victim.

Six months after the status conference at which the court approved the terms of the settlement, the court held another status conference. After the status conference, the prosecutor informed the victim that the conditions on which the agreement was based would expire in the next month. In middle of the next month, the court entered an order dismissing the charge against the defendant on the basis of the prosecutor's motion.

Statutes Involved

Wisconsin Stat. § 950.04(1v)(zm) provides that crime victims have the right "[t]o request information from a district attorney concerning the disposition of a case involving a crime of which he or she was a victim, as provided under s. 971.095(6)."

Wisconsin Stat. § 971.095(6) provides that "[a] district attorney shall make a reasonable attempt to provide information concerning the disposition of a case involving a crime to any victim of the crime who requests the information."

Wisconsin Stat. § 971.315 provides that "[b]efore a court dismisses a criminal charge against a person, the court shall inquire of the district attorney whether he or she has complied with [Wis. Stat. §] 971.095(2)."

Wisconsin Stat. § 971.095(2) provides that a district attorney must confer with a victim who has requested to do so, "concerning the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations."
Wisconsin Stat. § 950.04(1v)(pm) gives victims the right "[t]o have the court provided with information pertaining to the economic, physical and psychological effect of the crime upon the victim and have the information considered by the court."

Wisconsin Stat. § 757.14 provides, in relevant part, that "[t]he sittings of every court shall be public and every citizen may freely attend the same, except if otherwise expressly provided by law on the examination of persons charged with crime[.]"

Report and Recommendation

1. The Legislature and the appellate courts "have demonstrated a great reluctance to shield the judicial process from public view." *In re Mental Condition of Billy Jo W.*, 182 Wis. 2d 616, 646, 514 N.W.2d 707 (1994). *See also* Wis. Stat. § 757.14; *State ex rel. La Crosse Tribune v. Circuit Court*, 115 Wis. 2d 220, 232, 340 N.W.2d 460 (1983) (recognizing "clear and express legislative policy that courts are to be open to all the people. The fact that the court sits in the judge's chambers, rather than in a courtroom, is irrelevant to whether or not it constitutes a sitting of a court"). The need for transparency is nowhere greater than in the administration of the criminal justice system, because "[t]he ability of the courts to administer the criminal laws depends in no small part on the confidence of the public in judicial remedies, and on respect for and acquaintance with the processes and deliberations of those courts." *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring and dissenting). Open court proceedings are designed to allow the public to gauge how well the prosecutorial and judicial systems are functioning. *Billy Jo W.*, 182 Wis. 2d at 648.

2. The district attorney in Wisconsin is a constitutional officer and is endowed with a discretion that approaches the quasi-judicial. *State v. Peterson*, 195 Wis. 351, 359, 218 N.W. 367 (1928). As a prosecutor, the district attorney "enjoy[s] largely unfettered discretion in the *initiation* of criminal proceedings." *State v. Braunsdorf*, 98 Wis. 2d 569, 572, 297 N.W.2d 808 (1980) (emphasis added). After a criminal complaint is filed, however, "'[p]rosecutorial discretion to terminate a pending prosecution in Wisconsin is subject to the independent authority of the trial court to grant or refuse a motion to dismiss "in the public

interest.'"" *Braunsdorf*, 98 Wis. 2d at 574, quoting *State v. Kenyon*, 85 Wis. 2d 36, 45, 270 N.W. 160 (1978). In *Guinther v. Milwaukee*, 217 Wis. 334, 339, 258 N.W.2d 865 (1935), the court said the following about the factors and considerations that must be considered when determining whether to accept a district attorney's motion to dismiss a pending prosecution:

> Where a public interest is involved, or the interest of a third party, it is the duty of the court to consider those interests in determining whether or not to dismiss an action.

3. The victim of a crime that is being prosecuted by a district attorney has a legislatively-recognized interest in the outcome of that case. For that reason, Wis. Stat. § 971.315 requires the circuit court to inquire of the district attorney whether he or she has complied with Wis. Stat. § 971.095(2); that is, whether he or she has conferred with a victim who has requested an opportunity to confer about the prosecution of the case and the possible outcomes of the prosecution, including potential plea agreements and sentencing recommendations. Moreover, Wis. Stat. § 950.04(1v)(pm) gives victims the right to have the court consider the economic, physical, and psychological effect of the crime on the victim. Whether an involved victim has been informed about an agreement that could result in dismissal of the case, and the effects of the crime upon the victim are relevant considerations for a court trying to decide whether the dismissal of a prosecution is in the public interest.

4. Victims must be afforded a reasonable opportunity to exercise their rights if those rights are to be meaningful. A circuit court must give crime victims the opportunity to provide information about the economic, physical, and psychological effect of the crime before it acts to approve the terms of a settlement agreement between the prosecution and the defense that will necessarily result in the dismissal of charges against the defendant if the terms of the agreement are satisfied.

5. An in-chambers and off-the-record status conference procedure for considering whether the proposed settlement of a criminal case is in the public interest deprives the victim of a meaningful opportunity to provide the court with information about the effects of the crime upon him or her. Such a procedure deprives the public of the opportunity to gauge how well the prosecutorial and judicial systems are functioning. Such a procedure deprives the public of knowing whether the court asked the district attorney whether he or she conferred with the victim about the proposed agreement and the potential outcome of the case. Such a procedure deprives the public and any reviewing court of the assurance that the court considered all of the relevant factors in determining whether the proposed settlement is in the public interest, and the assurance that the court employed a reasoning process in making its discretionary determination that a proposed settlement is in the public interest. Whether or not a proposed settlement contains a confidentiality provision, the

exclusion of victims from in-chambers and off-the-record status conferences that may automatically lead to the final disposition of the case prevents victims from obtaining information about the disposition of the case to which they are statutorily entitled.

6. Wisconsin law strongly disfavors attempts by public agencies to shield settlements from public scrutiny by pledges of confidentiality. The courts have usually determined that the public interest in the disclosure of settlements outweighs the public interest in maintaining the confidentiality of settlement agreements, regardless whether the settlement is formally approved by the court or not submitted for the court's approval. *In Matter of Estates of Zimmer*, 151 Wis. 2d 122, 131-37, 442 N.W.2d 578 (Ct. App. 1989); *Journal/Sentinel v. Shorewood School Bd.*, 186 Wis. 2d 443, 451-55, 521 N.W.2d 165 (Ct. App. 1994). The public interest in disclosure of information is particularly compelling in circumstances involving alleged wrongdoing by public employees in positions of trust or authority, such as police officers. *State ex rel. Journal/Sentinel, Inc. v. Arreola*, 207 Wis. 2d 496, 515, 558 N.W.2d 670 (Ct. App. 1996) (police officers have a lower expectation of privacy); *Kroeplin v. Wisconsin DNR*, 2006 WI App 227, ¶ 46, 297 Wis. 2d 254, 725 N.W.2d 286 (public interest in being informed of alleged misconduct by law enforcement officers and the extent to which those allegations were properly investigated is particularly compelling).

7. Although the Board takes no position as to whether the requirement of Wis. Stat. § 757.14 that "sittings" of courts must ordinarily be open to the public applies to judicial determinations that a proposed settlement of a filed criminal case is in the public interest, the use of in-chambers and off-the-record status conferences to make those determinations poorly serves the public and victim interests recognized by law.

8. Where a prosecutor and defendant's counsel have reached an agreement to resolve a filed criminal case through the use of a deferred prosecution agreement or an agreement simply to hold the case open while the defendant satisfies conditions that would result in dismissal of the case, the best practice is for the court to (a) set a hearing for its consideration of the proposed settlement agreement, (b) to provide all victims with notice of the hearing, (c) to allow all victims to provide the court with information about the effects of the crime upon them, and (d) to allow the victims to make statements to the court regarding the alternative dispositions of the case contemplated by the proposed agreement, before (e) determining on the record and in light of the relevant factors whether to approve the proposed settlement.

9. Where a prosecutor and defendant's counsel have reached an agreement to resolve a filed criminal case in a manner that could result in a dismissal or another disposition without trial, and the proposed agreement contains a term to keep secret the conditions that must be satisfied in order to result in the dismissal or other disposition without trial, the best practice is for the court to set a hearing

for the consideration of the proposed settlement agreement, to provide notice to all victims, and for the court to take up as its first order of public business whether it is in the public interest to maintain the secrecy of the proposed agreement. Only in those rarest of circumstances where the public interest clearly favors confidentiality should the court exclude the public and the victim from the portion of the hearing which determines whether the proposed settlement is in the public interest. In all other circumstances, the best practice is for the court to follow the procedure outlined in the preceding paragraph.

Dated this 7th day of Aug., 2008.

KENNETH R. KRATZ
Chairperson
Crime Victims Rights Board